IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER EDWARD BRILEY, JR.,
Appellant,

vs.

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,
Appellee.

No. 20454

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

DON JACOBSON
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1916

Attorneys for Appellee

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JURISDICTION

The order of the United States District Court for the Northern District of California denying the petition for writ of habeas corpus in the proceeding entitled Briley v. Wilson, No. 43331, was issued April 27, 1965 (R. 27). Appellant's application for a certificate of probable cause and motion for leave to appeal in forma pauperis were filed May 12, 1965 (R.28). At this same time, in addition to an affidavit showing appellant was without funds necessary to prosecute the appeal (R. 29), appellant also filed points and authorities in support of his application for certificate of probable cause (R. 30-33). The District Court certified that there was probable cause for the appeal and

On August 12, 1965, granted appellant's motion for leave to appeal in forma pauperis (R. 34-35). Appellant invokes the jurisdiction of this court pursuant to 28 United States Code 2253.

STATEMENT OF THE CASE

This brief represents the initial appearance in this matter of the California Attorney General on behalf of appellee and respondent, Lawrence E. Wilson. Appellee filed no pleadings in the court below.

Appellant was convicted on May 22, 1959, in the Superior Court for Los Angeles County, after a plea of guilty, of one count of second degree murder in violation of California Penal Code section 187 (R. 2). No appeal was taken from the conviction.

A petition for a writ of habeas corpus was filed in the Superior Court for Marin County and denied on October 29, 1964 (R. 6). A like petition for habeas corpus was thereafter filed in the California Supreme Court and was denied on February 10, 1965 (R. 6).

Appellant is presently imprisoned in the California State Prison at San Quentin and is serving an indeterminate sentence of from five years to life (R. 2).

STATEMENT OF THE FACTS

The record before the District Court consisted only of appellant's petition. This petition contained the

following allegations:

1. Because petitioner was initially arrested and searched on a burglary charge, it was improper to later charge him with murder.

2. Evidence secured from petitioner's home, car, person, and thoughts (by a lie detector examination), was obtained through illegal searches and seizures.

3. The interrogating officers violated his constitutional rights because they failed to advise him of his right to counsel and his right to remain silent before he made incriminating statements.

4. The trial court was without jurisdiction to try defendant because the public defender, over petitioner's objections, waived the time limit within which the preliminary hearing must be held.

5. Although both the prosecution and defense stipulated that the coroner's report was admissible into evidence, nevertheless, the trial court erred in allowing its admission because appellant was not 'fully advised of his right of waiver of stipulated testimony . . . .'
(R. 18).

SUMMARY OF APPELLEE'S ARGUMENT

I. The petition did not state facts entitling appellant to relief in the District Court.

ARGUMENT

Where the District Court has dismissed a petition without the issuance of an order to show cause, the question on appeal becomes whether, assuming the allegations of the petitions to be true, a violation of some federal constitutional guarantee has been shown. Boyden v. Webb, 208 F.2d 201, 203 (9th Cir. 1953).

The petition must allege primary facts which show that the state prosecution departed from constitutional requirements. Schlette v. People, 284 F.2d 827, 831-832 (9th Cir. 1960), cert. denied, 366 U.S. 940 (1961). Mere conclusionary statements, without factual support, are insufficient. Facts must be set out "with particularity and in detail in a petition for the writ." Linden v. Dickson, 278 F.2d 755, 757 (9th Cir. 1960).

Where the petition states that appellant was represented by counsel at the time of the preliminary hearing and at the time he entered a plea of guilty, and there is no specific allegation that the said plea of guilty was illegally induced, the petition for habeas corpus should be summarily denied. This must follow because a plea of guilty, entered upon advice of counsel, by its very nature forecloses the consideration of any errors which may have occurred prior thereto. Thus, neither the alleged

procedural errors nor the illegally secured evidence have contributed to appellant's conviction; his conviction was based solely upon his plea of guilty. _Thompson_ v. _Burke_, 334 U.S. 736 (1948); _Hardee_ v. _Wilson_, 363 F.2d 848 (9th Cir. 1966); _Wallace_ v. _Heinze_, 351 F.2d 39 (9th Cir. 1965); _McGrath_ v. _LaVallee_, 348 F.2d 373 (2d Cir. 1965); _Davis_ v. _United States_, 347 F.2d 374 (9th Cir. 1965); _Harris_ v. _United States_, 338 F.2d 75 (9th Cir. 1964); _In re Seiterle_, 61 Cal.2d 651 (1964). In the _Harris_ case, this Court quoted with approval from _Thomas_ v. _United States_, 290 F.2d 696, 697 (9th Cir. 1961):

> "'By his plea of guilty appellant foreclosed his right to raise objections to the manner in which evidence upon which he was indicted was obtained. This evidence, because of his guilty plea, was not used against him. Had he stood trial his objection to its introduction, if made and overruled by the trial court, could have been raised on appeal. Under the circumstances he may not belatedly raise the contention under 28 U.S.C. § 2255. Eberhart v. United States, 9 Cir., 1958, 262 F.2d 421 * * * The conviction and sentence which follow a plea of guilty are based solely

> and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. United States v. French, 7 Cir., 1960, 274 F. 2d 297; United States v. Sturm, 7 Cir., 1950, 180 F.2d 413; Kinney v. United States 10 Cir., 1949, 177 F.2d 895.'" Harris v. United States, supra at 80.

Of course, where the petitioner specifically alleges that the plea of guilty was directly induced by the constitutional errors allegedly committed, then the District Court should not dismiss the petition for failure to state adequate grounds for habeas corpus relief. Cf. Johnson v. Wilson, ____ F.2d_____ (9th Cir. 1967); Gladden v. Holland, 366 F.2d 580 (9th Cir. 1966). But these are clearly not the facts of the instant case. Appellant made no allegation that his plea of guilty was coerced or otherwise illegally induced. On review, the question is whether the District Court acted properly in denying the application then before it. Therefore, on the basis of the above authority, appellant should not now be heard on issues which he himself has foreclosed consideration of.

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the order of the District Court denying

appellant's petition for writ of habeas corpus should be affirmed.

DATED: February 17, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

Don Jacobson
DON JACOBSON
Deputy Attorney General

Attorneys for Appellee

DJ:cmw
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: February 17, 1967

Don Jacobson
DON JACOBSON
Deputy Attorney General
of the State of California